IN THE HIGH COURT OF JUDICATURE AT BOMBAY

O.O.C.J.

ARBITRATION PETITION NO.368 OF 2005

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The Maharashtra State Co.operative
Marketing Federation Limited. ...Petitioner

v/s.

M/s.Jethmal Mulji Thakkar ...Respondent

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Mr.P.Phalkhiwala i/b Navdeep Vora & Associates for the Petitioner.

Mr.Milind Sathe with Ms.S.R.Kumbhat and Mr.K.K.Taded and Mr.Mahesh Jain for the Respondent.

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CORAM: D.K.DESHMUKH, J.

DATED: 7TH MARCH,2006

P.C.:

1. By this petition filed under Section 34 of the Arbitration & Conciliation Act the Petitioner challenges the award made by the sole arbitrator dated 20-6-2005. By that award the Arbitrator has directed the Petitioner/Federation to pay an amount of Rs.27,07,883.00 being the amount of brokerage on the sale effected by the Respondent as per clause 13 of the Agreement.

2. The facts that are necessary for deciding this petition are that the Respondents made a claim before the learned arbitrator that they are entitled to receive brokerage pursuant to the agreement entered into between the Petitioner and the Respondent on 12-1-2000 for sale of onion of the Petitioner under this agreement. In the statement of claim the claim of the Respondents was that as per the agreement between the parties during the period from January to

February, 2000, they have sold total 1107 wagons of the onion on behalf of the Petitioner and therefore, as per clause 13 of the agreement the Respondents became entitled to receive from the Petitioner as brokerage an amount of Rs.27,07,883.00, which has not been paid by the Petitioner to the Respondents. In paragraph 11 the Respondents claim that there were a reconciliation report dated 1-8-2000 on the transactions which were completed in March, 2000, and therefore the Respondents became entitled to the amount of brokerage before 3 years and 7 months of the statement of claim. The date of statement of claim is 28-2-2004. It was also claimed that the Petitioners have not paid the amount of brokerage despite repeated request and reminders and therefore the Respondents approached the Petitioner by letter dated 27-8-2003 for the appointment of the arbitrator. Thus, the dispute was referred to arbitrator.

3. To this statement of claim a reply was filed on behalf of the Petitioner. The claim made by the Respondents was denied and it was claimed that the claim made by the Respondents is barred by the law of limitation. Reliance was placed on the statement

made in paragraph 11 of the statement of claim. It was claimed that the Respondent itself has stated that payment has not been made even after expiry of a period of three years and seven months, since the Respondent became entitled to payment. Thereafter, the arbitrator made the award.

4. So far as the objection that the claim is barred by the law of limitation is concerned, the learned arbitrator rejected that objection. The learned arbitrator held that the date of reference to arbitration is 27-8-2003. The learned arbitrator, however, held that as the Petitioner never declined to make the payment the claim is not barred by the law of limitation. The learned Counsel appearing for the Petitioner submits that perusal of the statement of claim shows that according to the Respondent, its cause of action for making the claim accrued on 1-8-2000. It is clear from paragraph 12 of the statement of claim that the Respondent was claiming interest on the amount of brokerage with effect from 1-8-2000. It clearly means that according to statement of claim the cause of action accrued to the Respondent on 1-8-2000 and therefore, the reference should have been made within a period of three years

from 1-8-2000. According to the Petitioner in terms of the statement made in paragraph 13 of the statement of claim, a letter requesting appointment of arbitrator was written by the Respondent to the Petitioner on 27-8-2003. Therefore, the date of reference for the purpose of computing the period of limitation would be 27-8-2003. Therefore, the reference would be barred by the law of limitation.

5. The learned Counsel appearing for the Respondent, on the other hand, submits that the date of accrual of the cause of action is not 1-8-2000, but the cause of action accrued subsequently when the accounts were reconciled in the month of November, 2000. It is also submitted that though it was not pleaded by the Respondent that the cause of action accrued to the Respondent when accounts were reconciled in November, 2000, never the less, the letters were produced which show that the accounts were reconciled in November, 2000 and therefore the reference made on 27-8-2003 was within the period of limitation. It is also claimed that the date of reference is not 27-8-2003, because a request for referring the dispute to arbitration according to the Respondent was also made on 14-11-2002.

6. Now, if in the light of these rival submissions the record is perused, it is clear that in the statement of claim though the Respondent was under a duty to disclose as to what is the date on which according to him the cause of action accrued to him, the Respondent did not specifically state as to what is the date on which the cause of action accrued to him. However, the case of the Respondent in so far as the accrual of the cause of action is concerned, in my opinion, becomes clear from the averments found in paragraphs 11 and 12 of the statement of claim. Paragraphs 11 and 12 of the statement of claim read as under:-

> 11. The Claimants submit that the sale of the onion is effected by the claimants in the Month of January/February 2000 and the sale proceeds has been received by the respondent as reflected in reconciliation report dated 1.8.2000 referred to above. The claimants submit that admittedly the transaction was completed as early as March, 2000 and they have become entitled to receive the brokerage amounting to Rs.27,07,883.00 which they have

not received from the respondents for more than 3 years and 7 months till to day and there is delay in payment of the same for 3 years and seven months. The claimants submit that they are entitled to receive interest on the said amount for the delayed period at the rate of 24% p.a. amounting to Rs.23,28,771.00. The Claimants state that it was expected of public body that just dues will be paid immediately. The claimants submits that transaction in question is commercial transaction and they are entitled to receive interest on the said amount for the said delayed period. In the fairness and equity and also as per the law the claimants are entitled to receive interest at the rate of 24% p.a. on the said amount.

12. Thus, the claimants seek to recover from the respondents the sum of Rs.51,92,612.00 as per particulars here to annexed and shown as under:

I. Rs.27,07,883.00 being the amount of brokerage on the sale effected by the

claimants vide clause 13 of the agreement.

II. Rs.23,28,771.00 being the interest amount at the rate of 24% p.a. on the amount of brokerage the sum of Rs.27,07,883.00 for 3 years 7 months i.e. period from 1.8.2000 to 28.2.2004 for the period for the said amount is with held.

III. Rs.1,55,958.00 being the amount of interest on Rs.25,00,000.00 on being the earnest money for 138 days.

7. Perusal of above paragraphs 11 and 12 of the statement of claim makes it clear that so far as entitlement of the Respondent to receive the amount of brokerage is concerned, the Respondent was relying on the reconciliation report dated 1-8-2000. In other words, according to the Respondent, he became entitled to receive the amount of brokerage on 1-8-2000 and therefore he claims that there is a delay of three years and seven months in payment of the amount of brokerage. Perusal of paragraph 12 quoted above shows that the Respondent is claiming interest on the amount of brokerage from 1-8-2000.

If the right of the Respondent to receive the brokerage had not accrued on 1-8-2000, then the Respondent would not have claimed brokerage from that date i.e. 1-8-2000. In any case, the Petitioner had raised an objection in the written statement, which was in following terms.

> 3. The Respondent states that there is gross delay in invoking the Arbitration clause by the Claimant and filing of the present claim before the learned Arbitrator. In para 11 of the Statement of Claim, the Claimants have expressly admitted that there is a delay of 3 years and 7 months. The Respondent submits that based on the aforesaid admission made by the Claimants, the present claim is barred by the Law of Limitation. The Respondent submits that the Claimant are not entitled to prefer the present claim and the same should also be dismissed with costs on this count.

8. It is clear from paragraph 3 quoted above that the Petitioner was claiming that if the date of accrual of cause of action stated in the statement of claim by the Respondent is taken to be the date then

the claim is barred by the law of limitation. In the face of these pleadings, only method by which the Respondent could have claimed any other date as the date of accrual of cause of action was either by seeking an amendment in the statement of claim or by filing a counter affidavit. Admittedly, the Respondent did neither. Therefore, the Respondent could not have relied on any other day as the date of accrual of cause of action. Permitting the Respondent to rely on any date other than 1-8-2000 as the date of accrual of cause of action would have resulted in breach of principles of natural justice, because the Petitioner would not have got notice that the Respondent either after giving up his case that cause of action has accrued to him on 1-8-2000 or in the alternative is pleading on some other date as the date of accrual of cause of action. In my opinion, therefore, according to the Respondent the date of accrual of cause of action was 1-8-2000 and therefore, it was for him to make reference within a period of three years from that date. In terms of provisions of sub-section (2) of Section 43 of the Arbitration Act, arbitration is deemed to have commenced on the date referred in section 21. Perusal of the provisions of Section 21 shows that

the date of commencement of the arbitration is the date on which a request for that dispute to be referred to arbitration is received by the Respondent. As per the averments in paragraph 13 of the statement of claim, the Respondent approached the Petitioner by letter dated 27-8-2003 for appointment of an arbitrator. Therefore, the date of invoking the arbitration clause and the date of reference according to averments in the statement of claim was 27-8-2003. Perusal of the arbitral award also shows that the arbitrator has recorded a clear finding that the arbitration proceedings are deemed to have commenced on 27-8-2003. Therefore, the submissions of the Respondent that the date of commencement of arbitral proceeding is not 27-8-2003 cannot be accepted, firstly because it is no where so pleaded before the arbitrator and secondly in view of the clear finding recorded by the arbitrator in the absence of the Respondent challenging that finding as incorrect by filing an affidavit, argument in that regard cannot be entertained.

9. It is thus clear that the cause of action had accrued to the Respondent, on the Respondent own showing, on 1-8-2000 and the reference was made on

27-8-2003. Therefore, the reference was barred by the law of limitation. The finding recorded by the arbitrator that the claim is not barred by the law of limitation, therefore, is patently erroneous and is liable to be set aside.

10. As I find that the award is liable to be set aside as it is barred by the law of limitation, I do not propose to consider other grounds raised by the Petitioner.

11. In the result, therefore, the petition succeeds and is allowed. The award impugned in the petition is set aside. The Respondent to pay costs of this petition, as incurred by the Petitioner, to the Petitioner.

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